

EXHIBIT B

REDACTED

Page 1

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CYNTHIA RUSSO, LISA BULLARD,
RICARDO GONZALES, INTERNATIONAL
BROTHERHOOD OF ELECTRICAL
WORKERS LOCAL 38 HEALTH AND
WELFARE FUND, INTERNATIONAL UNION OF
OPERATING ENGINEERS LOCAL 295-295C
WELFARE FUND, AND STEAMFITTERS FUND
LOCAL 439, on Behalf of Themselves and
All Others Similarly Situated,
Plaintiffs,
vs. Case No. 17-CV-2246
WALGREEN CO,
Defendant.

VIDEO DEPOSITION OF
DR. KENNETH SCHAFERMEYER
Taken on behalf of the Defendant
January 13, 2023

1 Q. Paragraph.

2 A. Paragraph 50, sure.

3 Okay.

4 Q. In paragraph 50 you say, for decades
5 there was no dispute about the definition of U&C,
6 it was universally understood to be the lowest
7 price offered by a pharmacy to customers paying for
8 a prescription drug without insurance, including
9 all discounts.

10 Did I read that correctly?

11 A. I wasn't reading with you but I can
12 read it myself. I understand what it says.

13 Q. Okay. And in this paragraph of your
14 report there's no citation to any source materials
15 for the opinions stated in paragraph 50, is that
16 correct?

17 MR. DWOSKIN: Form.

18 A. Well, this particular issue is really
19 not in dispute and nobody argued over the position
20 of usual and customary for decades until some
21 people started contriving these scams to manipulate
22 usual and customary.

23 Q. (BY MR. ROBINSON) How many decades
24 are we talking about in paragraph 50, or are you
25 talking about in paragraph 50? How far back was

1 definition was.

2 Q. But have you seen any -- what was the
3 basis for your understanding in 1976 when you first
4 became a listened pharmacist as to the definition
5 of usual and customary?

6 MR. DWOSKIN: Form. I had to process
7 insurance claims and I know Missouri Medicaid would
8 not pay more than usual and customary, and we all
9 knew what that meant.

10 Q. (BY MR. ROBINSON) How did you all,
11 who is it that all knew what was meant?

12 A. Well, I don't think it was in
13 dispute, I never heard anybody dispute that. I
14 mean I can't speak for everyone in the world but I
15 never heard anyone dispute it. I never heard of
16 any controversy surrounding the definition of usual
17 and customary until relatively recently.

18 Q. I'm not asking you about customary.
19 I want to know how you know that it was universally
20 understood that U&C was defined to be the lowest
21 price offered by a pharmacy to customers paying for
22 take prescription drug without insurance including
23 all discounts?

24 A. Well, let's say this: If there was
25 some dispute about it, there was controversy over

1 what that definition was, there would be public
2 debate with it, there would be articles about it,
3 there should be some news stories about it and
4 there would be discussions at meetings, and I would
5 have certainly heard about that and been aware of
6 it. I can tell you that there is no such
7 discussion, no such dispute, until after these
8 plans popped up around 2006. So you're not going
9 to find something in the literature to document
10 something that's universally agreed upon because
11 it's not a matter of controversy and it's not even
12 worth talking about. There's no dispute about this
13 issue. If there was we would find those arguments
14 in the literature.

15 Q. So you're saying that -- let me make
16 sure I understand this. You're not aware of any
17 literature, scholarly literature or trade
18 literature in the pharmaceutical industry which
19 talks one way or the other back in '70s, '80s,
20 '90s, about the universal understanding of the
21 definition of usual and customary price.

22 MR. DWOSKIN: Form.

23 A. Pharmacies had their cash price and
24 that's what they were supposed to submit as usual
25 and customary, and that's what pharmacies did, and

1 there wasn't debate about that. So that was the
2 industry practice at the time and I'd say that this
3 controversy was created by companies that wanted to
4 circumvent usual and customary.

5 MR. ROBINSON: Move to strike the
6 entire answer as nonresponsive?

7 Q. (BY MR. ROBINSON) My question to you
8 Dr. Schafermeyer was whether you were aware of any
9 scholarly literature or trade publications in the
10 pharmaceutical industry one way or the other that
11 describe a universal understanding of the
12 definition of usual and customary price.

13 MR. DWOSKIN: Form.

14 A. I'll explain it a different way. All
15 pharmacists had to process claims, they had to
16 understand what their contract terms were so they
17 had to understand what the term was. In all my
18 experience I have not seen literature or heard any
19 controversy about what that definition was until
20 after around 2006, 2008, somewhere in that range.

21 MR. ROBINSON: Move to strike as not
22 responsive.

23 Q. (BY MR. ROBINSON) Again Dr.
24 Schafermeyer, my question to you is are you aware
25 of whether there is any scholarly literature or

1 trade publication prior to the 2006 time period
2 which describes a universal understanding of the
3 definition of the phrase usual and customary price,
4 yes or no?

5 MR. DWOSKIN: Form. Asked and
6 answered.

7 MR. ROBINSON: It's been asked but it
8 hasn't been answered.

9 A. Well Mr. Robinson, you don't like the
10 answer but I answered it and I'm staying with my
11 answer. I think I answered it perfectly.

12 Q. (BY MR. ROBINSON) Are there
13 articles, either scholarly publications or in trade
14 journals prior to 2006 that you're aware of that
15 describe a universally understood definition of the
16 phrase usual and customary price?

17 MR. DWOSKIN: Form. Asked and
18 answered.

19 A. I'm not aware of any articles that
20 said it was a matter of controversy that people
21 didn't understand it.

22 Q. (BY MR. ROBINSON) And at the same
23 time you're not aware of any articles that said
24 people did understand it, are you?

25 A. Well, look. If they all understood

1 it why would they debate it?

2 MR. ROBINSON: Object, move to strike
3 the answer as nonresponsive.

4 Q. (BY MR. ROBINSON) And I repeat Dr.
5 Schafermeyer, are you aware of any articles in
6 either trade publications or scholarly literature
7 where people, where a universal definition of the
8 phrase usual and customary was described?

9 MR. DWOSKIN: Form, asked and
10 answered.

11 A. I know you're looking for something
12 but you're not going to get it, but I'm standing on
13 my answer.

14 Q. (BY MR. ROBINSON) We'll be back
15 after we go to the judge on this Dr.
16 Schafermeyer --

17 A. I'm fine with that. Go ahead.

18 Q. You can continue not answering my
19 questions but we'll be back.

20 A. You don't like my answer, sorry. I
21 answered it.

22 Q. No, you're not answering the
23 question, it's a very simple yes or no question.

24 Are you aware of any articles in a
25 trade publication or in an academic journal that

1 says that there is a universally understood
2 definition of usual and customary price one way or
3 the other, regardless of what the definition is, is
4 there any article that you can tell me that you
5 know of that discusses the fact that there was a
6 universally understood definition of usual and
7 customary price prior to 2006?

8 MR. DWOSKIN: Form. Asked and
9 answered.

10 Mr. Robinson, you know you've asked
11 this question many times, I understand that you may
12 not be satisfied with the answer Dr. Schafermeyer's
13 provided but that is his answer. He does not have
14 to answer it again. Let's just move on.

15 Q. (BY MR. ROBINSON) Dr. Schafermeyer,
16 are you refusing to answer my last question?

17 A. Oh, no, I answered your question.
18 You're refusing to accept it.

19 Q. Have you at any point reviewed any,
20 as part of your report, have you reviewed any
21 contracts either between third party payers and
22 PBMs or third party, or PBMs and pharmacies that
23 contain a definition of the term usual and
24 customary prior to the year 2000?

25 A. Part of this report.

1 their contract provider manual says, and I'm also
2 aware of Caremark's financial incentives to say
3 that.

4 MR. ROBINSON: Move to strike that
5 answer as nonresponsive.

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20 MR. ROBINSON: I'm going to move to
21 strike everything after I was aware of what he
22 said.

23 A. I'll stand on my answer, so I'm sorry
24 you don't like it.

25 Q. (BY MR. ROBINSON) The judge will

1 discounts should be considered in usual and
2 customary.

3 Q. Have you talked to any state, in
4 those states that have recently changed their U&C
5 definition, have you talked to any state regulators
6 about the reason why they made those changes?

7 MR. DWOSKIN: Form.

8 A. No. I wouldn't say they changed
9 their requirements, I think they clarified their
10 requirements. And have I talked to them personally
11 about that? No. But I see the sequence of events
12 and understand the reasoning for what they're
13 doing.

14 Q. (BY MR. ROBINSON) And have you read
15 any newspaper articles or government publications
16 that discuss the reason why those states made
17 changes in their U&C definitions?

18 MR. DWOSKIN: Form.

19 A. I don't think I have seen newspaper
20 articles about that.

21 Q. (BY MR. ROBINSON) Have you seen any
22 other government publications that discuss the
23 reasons why those states clarified their usual and
24 customary definitions?

25 MR. DWOSKIN: Form.

1 A. Well, I'm aware of the sequence of
2 events and why they would need to do that, sitting
3 here right now I can't recall a publication but I
4 think I'm aware of their rationale.

5 MR. ROBINSON: I'm going to move to
6 strike as nonresponsive other than sitting here
7 right now I can't recall a publication.

8 Q. (BY MR. ROBINSON) Let me ask you Dr.
9 Schafermeyer to turn to paragraph 84 of your
10 opinion. It's Exhibit 500.

11 And I think paragraph 84 may be on
12 page 23 of the pdf for those who are looking at the
13 pdf.

14 A. Okay.

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1 manual and assume that's what they're doing. That
2 would be reasonable expectation on their part.

3 Q. Have you ever talked with a third
4 party payer to see if they actually read the
5 provider manuals issued by the PBMs with whom they
6 contract?

7 MR. DWOSKIN: Form.

8 A. Are you talking about the third party
9 payer, about whether the pharmacy, I'm sorry, about
10 whether PBM -- I'm sorry. You're asking whether
11 the third party payers have ever told me that they
12 read the provider manuals?

13 Q. Yes.

14 A. I don't recall a specific instance
15 but they would be available. I have seen instances
16 with the provider manuals were attached as an
17 exhibit and that's pretty common, so the payers
18 would have access to those provider manual before
19 they ever sign a contract.

20 Q. But you're not aware of any of these
21 third payer payers who have told you that they have
22 read that third party provider Form.

23 A. I've seen that they were requested
24 and provided in RFPs, so they're available.
25 Whether they actually read it, I didn't get in

1 their mind and figure out, and I don't think
2 somebody's actually told me they did, but if
3 they're requested and provided I would think that,
4 you know, this publicly available information would
5 give them some idea of what to expect.

6 Q. The contracts between the third party
7 payers and the PBMs, they're often confidential as
8 well, isn't that correct?

9 MR. DWOSKIN: Form.

10 A. Well, I assume that they would be.
11 Yeah, I mean there's a lot of contracts and a lot
12 of contracts are confidential, I wouldn't be
13 surprised if they were.

14 Q. (BY MR. ROBINSON) And if the
15 contract between a third party payer and the PBM
16 was confidential when Walgreens was contracting
17 with the same PBM it would not have access to the
18 terms of that PBM's contract with the third party
19 payer, isn't that true?

20 MR. DWOSKIN: Form.

21 A. Well, so Walgreens might not know
22 that but I think they know the industry definition
23 of usual and customary.

24 Q. (BY MR. ROBINSON) They wouldn't
25 know, Walgreens wouldn't know the definition that

1 not sure it's responsive to your question. Ask me
2 your question again.

3 Q. Do you have any basis for saying that
4 Walgreens and Express Scripts were legally
5 prohibited from agreeing to the language that they
6 put into section 1.26?

7 A. So my basis for this is that there is
8 an agreement between the payer and the PBM, in this
9 case Express Scripts, and there's also an industry
10 definition of usual and customary which was in
11 effect before Walgreens contrived this scam. So
12 the fact that Walgreens convinced Express Scripts
13 to look the other way and they both benefit
14 financially from it, the question is does that
15 relieve them of their duty to provide the true
16 usual and customary. I see they have this
17 agreement, but this agreement doesn't meet the
18 reasonable expectations of the payer who contracted
19 with Express Scripts and the payer expects to
20 receive the true usual and customary in an accurate
21 and truthful claim. The fact that Walgreens and
22 Express Scripts get together and make a change
23 doesn't change the first contract between the payer
24 and Express Scripts, that contract's still in
25 effect. And so the reasonable expectations of the

1 payer is they would receive accurate claims in the
2 true usual and customary.

3 Q. Have you talked to any of the payers
4 who contracted with Express Scripts in this case to
5 determine what they expected Express Scripts to
6 charge them for prescriptions?

7 MR. DWOSKIN: Form.

8 A. Well, I read the complaint and I
9 think the complaint lays out what their
10 expectations were and I understand with a, what
11 they would reasonably expect.

12 Q. (BY MR. ROBINSON) Did you -- let me
13 ask again.

14 Have you talked to any of the payers
15 who contracted with Express Scripts in this case to
16 determine what they expected Express Scripts to
17 charge them for prescriptions covered by their
18 plans?

19 MR. DWOSKIN: Form.

20 A. I didn't talk with them because
21 there's other information available and I already
22 had an understanding what that expectation should
23 be.

24 Q. (BY MR. ROBINSON) Besides the
25 complaint that was drafted by the lawyers for the

1 plans do you have any document that you are relying
2 upon to tell you what the expectations of the plans
3 actually were with respect to how much they would
4 be charged by Express Scripts?

5 MR. DWOSKIN: Form.

6 A. I think that's in my report in which
7 I talked about the understanding of what a cash
8 prescription is, understanding what usual and
9 customary is, what the NCPDP standards are and I
10 think that is related throughout my report.

11 Q. (BY MR. ROBINSON) But you haven't
12 talked to any, you haven't interviewed any of the
13 plans to find out what in fact they expected
14 Express Scripts to do under the contract, isn't
15 that right?

16 MR. DWOSKIN: Form.

17 A. That wasn't necessary to understand
18 what's going on.

19 Q. (BY MR. ROBINSON) So the answer is
20 you did not talk to any of the pans, correct?

21 A. I didn't feel it was necessary to
22 talk to the other plans and no, I didn't.

23 Q. And have you talked to any of the
24 individual plaintiffs in this case to find out what
25 it is that they actually expected to be charged

1 under their insurance plans?

2 MR. DWOSKIN: Form.

3 A. That wasn't necessary.

4 Q. (BY MR. ROBINSON) And you recall,
5 you recall that in, when you testified recently in
6 the Humana arbitration you testified that
7 pharmacies and PBMs are free to change the
8 definition of usual and customary price in their
9 contracts.

10 Do you remember saying that?

11 MR. DWOSKIN: Form.

12 Mr. Schafermeyer, excuse me, Dr.
13 Schafermeyer, with respect to testimony or evidence
14 that was offered in the Humana v Walgreens
15 arbitration, which I understand is based by its own
16 protective order, I would caution you against
17 sharing any information which you believe is
18 subject to that protective order.

19 MR. ROBINSON: And Counsel that's a
20 misstatement of the protective order. The
21 arbitration itself was not confidential, there was
22 specific information that was produced in the
23 arbitration that was confidential, that does not
24 include Dr. Schafermeyer's opinion about the
25 freedom of contract enjoyed by pharmacies and PBMs.

1 qualify my answer that I don't know that there's
2 not more to this particular answer.

3 Q. Is it your testimony in this matter
4 that a PBM and a pharmacy are not free to have a
5 definition of usual and customary that is different
6 than the NCPDP definition?

7 A. Well, it's my testimony, my
8 understanding, that the definition applies as
9 determined by the payer in a PBM and the PBM
10 shouldn't be working with pharmacies to circumvent
11 that. And so if they're free to define the
12 contract it should be in compliance with what the
13 payer expects. And so the suit is about the
14 reasonable expectations of the plaintiffs, those
15 reasonable expectations aren't being met if there's
16 a secret contract to circumvent that PBM agreement
17 between a payer and a PBM.

18 Q. Do you agree with me from Walgreens'
19 perspective the contract between the PBM and the
20 third party payer is also secret, isn't that true?

21 MR. DWOSKIN: Form.

22 A. Well, these contracts are often
23 confidential, I don't know if this one in
24 particular is or not but I wouldn't be surprised if
25 it was. I can see where they might want to make it

1 confidential.

2 Q. (BY MR. ROBINSON) If Walgreens
3 doesn't know the definition in the contract between
4 the PBM and the third party payer but the PBM does,
5 isn't it the PBM's responsibility to do, to make
6 sure it's done whatever it's required to do by the
7 third party payer?

8 MR. DWOSKIN: Form.

9 A. I see what you're saying. The PBM
10 certainly would be parties to both contracts and
11 should be consistent. But they, you know, if these
12 contracts were all confidential and Walgreens gets
13 them to go along with this ploy, the other parties,
14 and that's the part of my report, the other party,
15 the payer, wouldn't be aware of that. Now
16 Walgreens knows or should know the industry
17 definition of usual and customary, and they know
18 that they're sneaking around and trying to disguise
19 these cash prescriptions as something other than a
20 cash prescription. Why are they doing that? So
21 answering your question here is the contracts are
22 usually confidential and the PBM would know what
23 they're doing, I agree with that, but I think
24 Walgreens should also know because they're a party
25 to this ploy and they know what the industry

1 right?

2 MR. DWOSKIN: Form. Misstates
3 testimony.

4 A. Yeah. I didn't say that and I have
5 to look through my entire report for such a
6 reference, so. But we know why we're here and we
7 know what's happening in this industry, we know
8 what's happening in this case, that's why we're
9 here.

10 Q. (BY MR. ROBINSON) You haven't spoken
11 to any fund plaintiffs in this case, other than the
12 complaint you haven't looked at any written
13 statements from any of the fund plaintiffs about
14 what they expected their PBMs to do, isn't that
15 right?

16 MR. DWOSKIN: Form.

17 A. I wouldn't need to and I generally
18 don't want to be influenced by the plaintiff, I
19 want to give a reasonable answer based on my
20 expertise and talking to the plaintiff and having
21 them tell me what they would like me to say, I
22 don't do that. I look at the evidence, I look at
23 the complaint, I look at the evidence and I draw a
24 conclusion based on my knowledge and experience and
25 looking at the record. That's what I did. I

[REDACTED]

7 Q. So for example if we look at your
8 chart that's in table 3 on page 27 of your report.
9 You need to go back a page from what's on the
10 screen.

11 MR. ROBINSON: Let's go back to the
12 beginning of table 3 please.

13 This is page 32 of the pdf, John.
14 Page after this. There we go.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

4 Q. Have you ever discussed with any of
5 the payers in this case whether in fact they knew
6 what the terms in the contracts between their PBMs
7 and the pharmacies were?

8 MR. DWOSKIN: Form.

9 A. Have I ever talked with the payers?

10 Q. (BY MR. ROBINSON) Right.

11 A. No. Didn't need to.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

1 I just want to make it clear, you're
2 not providing a legal opinion on the effect that
3 the fund plaintiff's contracts the with PBMs had on
4 Walgreens' contracts with those same PBMs, is that
5 correct?

6 MR. DWOSKIN: Form.

7 A. I'm not a lawyer, I'm not providing a
8 legal opinion, I'm providing expert opinion on what
9 the reasonable expectations of the plaintiffs
10 should have been or were.

11 Q. (BY MR. ROBINSON) Without having
12 talked to a single one of the plaintiffs in this
13 case you're offering opinion on what their
14 reasonable expectations were, is that correct?

15 MR. DWOSKIN: Form.

16 A. I think my report stands for itself.

17 Q. (BY MR. ROBINSON) As part of your
18 report did you conduct any sort of research to look
19 for any contemporaneous statements by third party
20 payers as to what they expected to be charged under
21 their contracting with PBMs?

22 MR. DWOSKIN: Form.

23 A. Well, I did note that there was a lot
24 of litigation over this issue which I reported in
25 my report, so obviously a lot of payers must have

1 say when the Garvey appellate decision came out,
2 did you say 2016? I'm sorry.

3 A. No, I don't think that's what I said.
4 I don't think I said 2016. But it is what it is,
5 right?

6 MR. DWOSKIN: Right.

7 I think you said 2014.

8 Q. (BY MR. ROBINSON) I want to turn to
9 paragraph 109 please in your report.

10 Now, in paragraph 109 you're talking
11 about the pharmacy industry in the 1970s. Is that,
12 correct?

13 A. Well, starting in the 1970s and
14 after.

15 Q. Okay. And you didn't become a
16 pharmacist yourself until 1976, is that right?

17 A. Well, I was an intern before that and
18 so practiced as an intern for what, three years.

19 Q. When did you get your license?

20 A. As an intern or as a pharmacist?

21 Q. As a pharmacist.

22 A. 1976.

23 Q. And so what is the basis, what
24 research have you done to conclude that pharmacies,
25 PBMs and third party payers all knew that such

1 prices at the lowest price offered to cash paying
2 customers would be the pharmacy's U&C price? So my
3 question is what research have you done to verify
4 the understanding of the pharmacies, PBMs and third
5 party payers in the 1970s?

6 A. Well, you know, we had a long series
7 of questions about this same issue which I
8 answered, and I'm not sure how this is different
9 from your previous line of questions that we spent
10 a lot of time on. Can you explain how this is
11 different from your previous line of questions?

12 Q. I don't have to answer questions that
13 you pose Dr. Schafermeyer. I'm asking you about a
14 new statement in your paragraph. You disagree with
15 me there's nothing that's footnoted here, you
16 haven't cited to anything in paragraph 109 to
17 support your conclusion, so it I want to know
18 what's the basis for, upon which you made the
19 statement about what the pharmacies, PBMs and third
20 party payers all understood in the 1970s.

21 A. This is exactly what we talked about
22 before and I've lived in this industry and I've, my
23 area of study and expertise has been reimbursement
24 for prescription drugs through insurance programs,
25 both public and private, and so if there had been

1 some controversy, you remember the discussion now,
2 right? If there had been some controversy over
3 this issue it would have appeared in the
4 literature, but if everybody agrees to it this is
5 not something you find in the literature. There
6 was no argument about what usual and customary was.
7 It was, if you want to find when the controversy
8 starts it's not coincidental that it started about
9 the same time or shortly after companies started
10 creating these membership clubs to circumvent usual
11 and customary.

12 Q. So, what you're relying on to make
13 the statement in the last sentence of paragraph 109
14 is your experience in the industry and the fact
15 that there was no public debate over the definition
16 of usual and customary price, is that a fair
17 summary?

18 A. Before 2006 that would be true. Keep
19 in mind too that as third party prescriptions grew
20 there were fewer and fewer cash prescriptions and
21 pharmacies knew that they had to report their cash
22 prices and that there weren't that many cash
23 customers, so that just created a very high cash
24 price and very few, very few claims for a while
25 were adjudicated by insurance programs at usual and

1 book chapter was 2009 and that you wrote it in
2 2007?

3 MR. DWOSKIN: Form.

4 A. There's two editions of this book,
5 which one are you talking about?

6 Q. (BY MR. ROBINSON) I'll show you what
7 I'm talking about. I'm talking about the edition
8 that you produced through your lawyers in this
9 case.

10 MR. ROBINSON: Let's put up Exhibit
11 TT and mark that as, formally as Exhibit 510
12 please.

13 MR. WOROBJ: Exhibit 510 is marked.

14 Q. (BY MR. ROBINSON) So if you pull
15 Exhibit 510 from the Exhibit Share you'll see it
16 has the Bates numbers that say Schafermeyer_0000564
17 through 591.

18 A. Okay.

19 Q. You'll see there's a copyright date
20 of 2009 on page 2 of the document?

21 A. Yeah. Uh-huh.

22 Q. Okay. And do you remember telling me
23 in the Humana case that you believe you wrote this
24 in 2007?

25 A. At least by then. That may be when I

1 finished it, I may have, or when I submitted the
2 last copy edits. I probably started before that.
3 I remember this book took a long time and I was
4 finished with my chapter well before the book got
5 published. So I would say 2007, maybe even before.

6 Q. And you see, and you called this the
7 definitive, this textbook as in your words the
8 definitive textbook on managed care pharmacy, is
9 that correct?

10 A. At that time it was, yeah.

11 Q. And let's turn to page 391. Do you
12 see at the top of the page it says usual and
13 customary prices?

14 A. Okay. Yeah.

15 Q. Okay. Says PBM says will not
16 reimburse pharmacies more than their usual and
17 customary price, i.e., the amount charged to cash
18 customers for prescriptions, pharmacy computers
19 should transmit the correct usual and customary
20 price when required by the PBM. Usual and
21 customary has different definitions but basically
22 it is translated as the cash price normally charged
23 to patients who do not have prescription insurance
24 coverage, this is an attempt by the PBM to assure
25 that they are not getting charged more than the

1 current quote, market, end of quote, prices for
2 medications.

3 Did I read that correctly?

4 A. Yes.

5 Q. And in this description that you
6 wrote the usual and customary price the phrase
7 quote, lowest price, unquote, doesn't appear in the
8 text you wrote, isn't that right?

9 A. Well, let's look at the historical
10 perspective here.

11 Q. No. Answer my question first before
12 you go talking about history.

13 A. I'd be glad to explain why. It
14 doesn't and there's good reason why it doesn't.

15 Q. Have there been subsequent editions
16 of this book, this chapter, in the managed care
17 pharmacy practice textbook?

18 A. Is this the second edition?

19 Q. Yes.

20 A. That's the last one I know about.

21 Q. Okay. So this, as far as, if anybody
22 went and looked for this book, Managed Care
23 Pharmacy Practice, in their local library what they
24 would find, or their university library, they'd
25 find the same definition that you wrote on page 391

1 while.

2 All right. Let's see the context.
3 And I should have commented about the context in my
4 report where I quoted the book in Navarro's chapter
5 too, because the context was an important point.

6 133 you said?

7 Q. (BY MR. ROBINSON) I didn't say it
8 but somebody on the line said it.

9 MR. DWOSKIN: Yeah, that's the
10 footnote number. Just trying to move it along.
11 Let's see what the record says.

12 A. Okay. I see that.

13 Q. (BY MR. ROBINSON) So you quoted,
14 this is on page 42 of your report, you cite to the
15 article by Dr. Mattingly and state a U.S.
16 Pharmacist article quoting the GAO definition
17 indicates that quote, the U&C rate is often
18 referred to as the cash price for patients, and
19 then you cited to the Mattingly article, correct?

20 A. That's what it says.

21 Q. Okay. And then if we look at the
22 Mattingly article, the article is called
23 Understanding Drug Pricing. See that?

24 A. I see that.

25 Q. Okay. Do you know Professor

1 Mattingly?

2 MR. DWOSKIN: Form.

3 A. University of Maryland? No. No, I
4 wouldn't say I know him personally.

5 Q. (BY MR. ROBINSON) Do you know Dr.
6 Mattingly by reputation?

7 MR. DWOSKIN: Form.

8 A. I really don't recall. No.

9 Q. (BY MR. ROBINSON) Okay. And on the
10 second page of his article, see there's a table?

11 A. Uh-huh.

12 Q. That's entitled Common Terms and
13 Acronyms Used In Drug Pricing?

14 A. Uh-huh.

15 Q. And then for usual and customary
16 price it says that the definition is the average
17 cash price paid at a retail pharmacy.

18 Is that right?

19 A. That's what it says but that's not
20 the portion I was quoting, and he also says later
21 on that, my point was to point out these are cash
22 prices. I'm not agreeing that it's average. You
23 put this in context to the article and this is
24 where Navarro fit in too is he was saying that
25 usual and customary is based on cash prices. In

1 other words, prices not paid by patients using
2 insurance benefit and that illustrates my point.
3 I'm not agreeing with this statement about average
4 cash price, I'm just saying look, he understands
5 the cash price, and so did the GAO, right?

6 Q. So he was, Dr. Mattingly was
7 authoritative enough for you to quote as supporting
8 your opinion but you would agree with me that he
9 provides a different definition of usual and
10 customary in 2012 than either the definition that
11 you provided in the book chapter in 2009 or the
12 definition in your expert report that you produced
13 in this case.

14 MR. DWOSKIN: Form.

15 A. Okay. So I think you're
16 misrepresenting my report. If you look at
17 paragraph 141 (b) I talked about the GAO definition
18 and this whole discussion has to do with the fact
19 that PSC customers are cash customers and I'm
20 illustrating that point. GAO defined usual and
21 customary as the price that a person without
22 insurance would pay. This author then refers to
23 that GAO definition, right, and he agrees that it's
24 the cash price. That's my point. I am not
25 endorsing his definition that it's average price or

1 saying that he's even expert in this. I'm just say
2 that he quoted GAO and agreed with the cash price
3 and that was my point.

4 Q. (BY MR. ROBINSON) Look, I understand
5 how you used Dr. Mattingly's article to support
6 what you were saying about the GAO report, but
7 isn't it true that Dr. Mattingly in his article
8 which you thought was authoritative to cite for the
9 quote you wanted, he says that the usual and
10 customary price means the average cash price paid
11 at a retail pharmacy, that's what he says.

12 MR. DWOSKIN: Form.

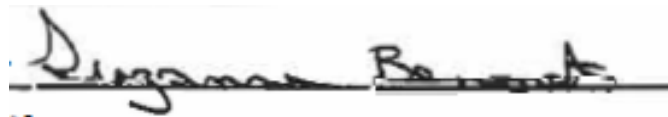
13 A. Well, again, from a historical
14 perspective, I'm not sure how aware he was of what
15 was going on in 2011, but historically average cash
16 price was the cash price because there was only one
17 cash price and so before 2007 for example or 2006
18 that statement would have been entirely correct.
19 I'm not sure that he was aware at that time when he
20 wrote this that things, that people were trying to
21 manipulate definitions. Maybe he would have been
22 more careful, but at one point the average price
23 was the price because there weren't multiple
24 different prices, not until we started playing
25 games with usual and customary.

REPORTER CERTIFICATE

I, SUZANNE BENOIST, Certified Shorthand Reporter, do hereby certify that there came before me via Zoom, the above-referenced parties, that the proceeding was translated and proofread using computer-aided transcription, and the above transcript of proceedings is a true and accurate transcript of my notes as taken at the time of said event.

I further certify that I am neither attorney nor counsel for nor related nor employed by any of the parties to the action in which this examination is taken; further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto or financially interested in this action.

Dated this 25th day of January, 2023.

A handwritten signature in black ink, appearing to read "Suzanne Benoist", is written over a horizontal line.

Ms. Suzanne Benoist, RPR,

CCR-MO, CCR-KS, CSR-IL, CSR-IA

Notary Public No. 07541281

State of Missouri - Jefferson County

My commission expires: 5/10/2024